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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

Rate Regulation)

MM Docket No. 92-266

EX PARTE MEMORANDUM

In connection with its pending petition for reconsideration in the above-captioned proceeding, the National Cable Television Association today submitted the attached memorandum to the following members of the Commission's staff:

Robert Corn-Revere
John Hollar
Byron Marchant
William Johnson
Alexandra Wilson
Marcia Glauberman

Respectfully submitted,

NATIONAL CABLE TELEVISION
ASSOCIATION, INC

By


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**EQUIPMENT PROVIDED ONLY TO SUBSCRIBERS WHO PURCHASE
PREMIUM AND PAY-PER-VIEW SERVICES SHOULD NOT BE
REQUIRED TO BE PROVIDED AT "ACTUAL COST"**

Both as a legal matter and from a policy standpoint, there is no basis for requiring that digital converter boxes and other equipment supplied only to cable subscribers who choose to purchase premium and pay-per-view programming be provided at "actual cost." The only effect of such a requirement would be to limit flexibility in the pricing of premium and pay-per-view services -- services that Congress chose not to subject to rate regulation so that cable operators might have flexibility to price and provide such competitive services in ways that best met consumer demand in the marketplace.

**The Cable Act Does Not Impose an "Actual
Cost" Requirement on Such Equipment**

The Cable Act of 1992 requires that equipment that is "used by subscribers to receive the basic service tier" be provided on the basis of "actual cost." This requirement is contained within that subsection of the Act that deals with regulation of basic rates, and it is designed to ensure that basic subscribers are charged reasonable rates not only for the programming that they purchase but also for the equipment provided to receive that programming.

When a subscriber purchases additional, optional programming -- either on tiers or on a per-channel or pay-per-view basis -- the equipment that is provided to him or her to receive that programming is typically also used to tune and watch basic tier programming. But there is no indication that Congress meant to subject all equipment to "actual cost" regulation; if that had been the case, Congress would have said so directly.

Nor does the fact that the scope of the requirement was changed, in the Conference Committee, from equipment "necessary" to receive the basic tier to equipment "used to" receive the basic tier mean that Congress intended to encompass all equipment within the "actual cost" requirement. To the contrary, this change in the language was necessary in order to subject remote control devices to the "actual cost" requirement. There is no doubt that Congress was concerned about excessive charges for remote control devices provided to basic subscribers. Such devices are never "necessary" to receive the basic tier, although they may be "used to" receive the service.

**Imposing an Actual Cost Requirement on Such
Equipment Disserves the Public Interest**

In any event, there are no policy reasons to subject equipment provided only to per-channel and pay-per-view subscribers to an "actual cost" requirement. The rates for per-channel and pay-per-view services are unregulated. If rates for

equipment provided in connection with such service are capped, cable operators can simply charge a higher rate for the programming service. The overall amount paid by subscribers for such services will not be reduced.

All that will be affected is the manner in which those services are marketed. Premium and pay-per-view services are marketed in a competitive environment that includes video rentals, movies at the theater, and, in the near future, direct broadcast satellite programming. Different cable operators may adopt different competitive strategies regarding the relative amounts that should be charged, initially or monthly, for the costly equipment necessary to receive such programming and for individual programs or services that are purchased. Some may believe that a high initial or monthly price for the equipment would deter subscribers from signing up for the option of receiving premium or pay-per-view programming. They might choose instead to charge a higher price for individual programming. For these operators, an "actual cost" requirement would cause no problems. But others might believe that subscribers would purchase more pay-per-view and premium programming if the up-front equipment charges were relatively high, but the per-program charges were relatively low in comparison to the competing sources of programming. For them, an "actual cost" requirement would simply preclude this competitive marketing strategy. There is no sound policy reason for the FCC to impose this marketing constraint on services and equipment Congress chose not to regulate.

The Act does apply the "actual cost" requirement to some addressable converter boxes and other equipment used to obtain premium or pay-per-view programming -- specifically equipment that is required to access programming purchased by basic subscribers pursuant to the anti-buy-through provisions of the Act.^{1/} In this special case, however, there is a valid policy objective for the "actual cost" proviso. Pursuant to the "anti-buy-through" provisions of Section 623(b)(8), basic service subscribers may purchase per-channel or pay-per-view services without purchasing intermediate tiers of cable programming services. Section 623(b)(8) prevents operators from discriminating against these subscribers, vis-a-vis subscribers to intermediate tiers, "with respect to the rates charged for video programming offered on a per channel or per program basis." Unless rates for equipment used for per-channel or pay-per-view programming were regulated with respect to basic subscribers

1/ Section 623(b)(3) applies actual cost requirements to "if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8)".

opting to bypass intermediate tiers, cable operators could conceivably use rates charged for such equipment to discriminate against such subscribers and deter such bypass. Outside this exception, however, the actual cost requirement is necessary for equipment offered only to premium or per-channel customers.

In sum, imposing an "actual cost" requirement on equipment provided to subscribers to services that are not otherwise subject to rate regulation does not affect the rates that other subscribers pay for programming or for equipment. It only affects the manner in which operators price and provide premium and pay-per-view programming. The "actual cost" requirements of the Act were not intended to have such an effect. Indeed, limiting flexibility in the offering of those unregulated services is exactly the opposite of what Congress intended.